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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

ALBERT HERNANDEZ,

Plaintiff and Appellant,

v.

MIKE BOUDREAUX et al.,

Defendants and Respondents.

F075145

(Super. Ct. No. VCU258707)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Tulare County. Bret D. Hillman, Judge.

Albert Hernandez, in pro. per., for Plaintiff and Appellant.

Deanne H. Peterson, County Counsel, and Amy I. Terrible, Deputy County Counsel, for Defendants and Respondents.

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Appellant Albert Hernandez appeals following the dismissal of his civil complaint against respondents, Tulare County Sheriff Mike Boudreaux, Sheriff's Deputy Diaz,

* Before Hill, P.J., Poochigian, J. and Smith, J.

Tulare County Jail, and Tulare County Human and Health Services.¹ Appellant states he is appealing from “the initial Judgement of June 16, 2015” in this matter, but ultimately contends the trial court wrongly denied his motion to set aside that dismissal. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant filed the initial complaint in this matter in November 2014. In that complaint, appellant claimed he had suffered harm from negligence and violations of his constitutional rights occurring when he was bitten on the hand by a police dog released during his arrest in February 2013 and later treated for that injury. Respondents demurred, contending appellant’s negligence claim was untimely and that his constitutional claims failed to allege facts sufficient to constitute a cause of action. The trial court sustained the demurrer on April 21, 2015, finding appellant had failed to timely file the negligence claim and had failed to allege any constitutionally defective policy or custom within the County of Tulare. The court sustained the demurrer without leave to amend on the negligence claim, but gave appellant 30 days to file an amended complaint on his constitutional claim.

Following the court’s order, on May 21, 2015, appellant filed a motion to stay the action pending his criminal proceedings. Then, on June 6, 2015, appellant filed a motion for discovery. The record in this appeal does not show what happened with these requests. During this period, respondents requested the court dismiss appellant’s complaint for failure to file an amended complaint. The court held a hearing on June 16, 2015, and the minute order shows the court granted the request and dismissed appellant’s case “without prejudice” at that time. The order filed June 17, however, stated the action was “dismissed with prejudice.”

¹ Appellant, an incarcerated individual, apparently erroneously identified the Tulare County Human Service Agency in his complaint, in place of the County of Tulare. The County of Tulare has defended the action from its inception.

Appellant attempted to appeal the June 16 ruling directly, but did not file the appeal until early 2016. This appeal was dismissed for lack of jurisdiction in May 2016, with the remittitur issuing in July. During the appeal, appellant appears to have continued filing documents in the underlying litigation.² As a result, he was informed on May 31, 2016, that the trial court could not accept his filings due to a lack of jurisdiction.

Despite this lack of jurisdiction, it appears the court received and recognized at least one filing during that period. Thus, on June 21, 2016, the court held a hearing, attended only by appellant via court call, on what was styled as appellant's motion to vacate tentative ruling. The minute order from this hearing shows appellant had moved the court to vacate its June 16, 2015 order. The court acknowledged the June 17, 2015, written order erroneously dismissed appellant's claims with prejudice and corrected that error pursuant to Code of Civil Procedure section 473,³ subdivision (d). With this correction, the court ruled appellant's motion was moot.

Two days later, on June 23, 2016, the court scheduled a case management conference. Both parties filed form responses, with respondents noting they would not be ready for any trial as they were unaware of any operative complaint, and, on August 11, 2016, appeared before the court. The minute order from this hearing shows the parties discussed the status of the case and that respondents requested appellant serve them directly with any future documents. Appellant continued to file requests with the court after this hearing, including a request for deposition subpoenas and that the court appoint a deposition officer that was rejected on October 6, 2016.

Finally, on October 26, 2016, appellant filed a motion for reconsideration and to set aside or vacate a ruling, requesting the court vacate its original June 16, 2015,

² The record submitted does not contain a complete listing of all the various filings and actions taken below.

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

dismissal order. Appellant raised several issues in his motion. First, appellant claimed he had attempted to file a similar motion on October 7, 2015, but that this document had been returned by the clerk's office because it lacked a proposed order. Attached to appellant's motion was a draft of this purported request, signed on both October 8 and November 1, 2015, but not showing it was filed. This error seems to have been corrected, however, as appellant also noted in the same argument that his motion to vacate was deemed moot based on the court's modification of its June 17, 2015 order to dismiss to "without prejudice." In both the filed and unfiled motions to vacate, appellant alleged the jail had intentionally tampered with his legal mail in a harassing manner. Appellant claimed in the 2016 filing that this harassment caused him to not receive certain documents, resulting in issues with timely requesting an extension for filing an amended complaint.

Next, appellant alleged his attempt to file an amended complaint had been improperly denied. He stated he had filed a proper request for leave to file an amended complaint on September 11, 2016, but received a responsive letter in October from opposing counsel informing him the documents were not filed and would not be responded to. Appellant attached purported copies of the cover pages for the motion to amend and the responsive letter from counsel.

Finally, appellant requested the court provide relief because he had filed both a request for extension of the amended complaint deadline and a motion to vacate the tentative ruling but was prevented from arguing his case because jail officials intercepted his legal mail. Appellant attached several documents purporting to document his problems with his legal mail, including complaints filed with the jail in June and July of 2015.

Respondents opposed appellant's request, arguing it was untimely and that the court lacked jurisdiction to hear the request. On December 13, 2016, the court held a hearing on appellant's motion. The court took the matter under submission before

issuing a written order denying appellant's request. In the order, the court recounted the dates appellant filed the original action, the court sustained the initial demurrer, and the court held a hearing and ultimately dismissed the matter. The court noted appellant had "attempted to file a motion to set aside the dismissal on October 16, 2015, but did not include all required documents" causing the papers to be returned to appellant unfiled. The court then stated appellant had actually filed a prior motion to set aside the dismissal while his untimely appeal was pending, a request the court had denied on June 21, 2016, before noting the current motion had been filed October 26, 2016. The court next recounted the requirement under section 473 that relief "be sought within a reasonable time, but no later than six months after judgment or dismissal has been entered" before concluding appellant's motion was not brought within the time specified and denying the motion for lack of jurisdiction.

This appeal timely followed.

DISCUSSION

As noted above, appellant's opening brief suggests he is attempting to appeal the trial court's June 2015 order dismissing his appeal. To the extent appellant maintains that position, we note he already attempted to appeal that issue in case number F073135 and had his appeal dismissed for lack of jurisdiction based on timeliness. Appellant's potential attempt to again directly appeal the June 2015 order suffers from the same flaws and is dismissed for lack of jurisdiction to the extent pursued here. We thus only consider appellant's appeal following the December 2016 denial of his request to be relieved of that order.

Standard of Review and Applicable Law

A dismissal "may be set aside pursuant to the provisions of Code of Civil Procedure section 473, subdivision (b), but the motion must be made within six months after entry" of the dismissal. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42, fn. omitted.) After the statutory time has passed, the court may set aside the dismissal

where a party establishes the order “was void for lack of due process [citation] or resulted from extrinsic fraud or mistake.” (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228.) “ ‘Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been “deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.” ’ ” (*Manson, supra*, 176 Cal.App.4th at p. 47.) “To qualify for equitable relief on the ground of extrinsic fraud or mistake, the moving party must demonstrate diligence in seeking to set aside the default once it was discovered.” (*Id.* at p. 49.)

We review the denial of a request to vacate a dismissal “on equitable grounds as we would a decision under section 473: for an abuse of discretion.” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

The Trial Court Did Not Abuse Its Discretion

The trial court’s order demonstrates it reviewed the timeliness of appellant’s request to be relieved of the June 2015 dismissal. The facts demonstrate the order issued in June 2015 and, therefore, any timely request under the statute needed to be filed by December 2015. Appellant did not actually file a first request for relief until sometime after February 2016, nearly two months after that deadline. That motion was denied as moot in June 2016. Appellant did not file the present request until October 2016, making it almost a year late. Under these facts, the trial court correctly concluded it lacked jurisdiction under section 473.

Although the parties argue this appeal in the context of section 473, we note that appellant’s arguments suggest a claim for relief on the ground of extrinsic fraud, based on his claims that the jail intentionally affected his ability to receive and respond to legal mail. However, even if we were to consider this ground for relief, not directly raised here or below, we would conclude the trial court did not abuse its discretion in denying relief. Appellant participated in both the demurrer and dismissal hearings and the record shows he was aware of the orders entered against him from the earliest instances. Despite this

knowledge, appellant failed to pursue the potentially timely motion for relief he attempted to file in October 2015, admits to not actually seeking to file an amended complaint until September 2016, and does not suggest he raised similar concerns regarding delays in his mail as part of, or appealed from the denial of, his first request to set aside the dismissal in June 2016. Thus, there is little to no evidence in the record by which the court could find appellant was diligent in seeking relief from the order once it was discovered.

DISPOSITION

The order is affirmed. Appellant's motion for stay of proceedings filed on September 18, 2018, is denied as moot.